86 1690

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

QUENTIN MEADOWS,

Petitioner,

—against—

ROBERT H. KUHLMANN, Superintendent, Sullivan Correctional Facility, Fallsburg, New York, ROBERT ABRAMS, Attorney General of New York, and DENIS DILLON, District Attorney of Nassau County,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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102 pp

QUESTIONS PRESENTED FOR REVIEW

1. Were the Petitioner's Constitutional Rights under the Sixth and Fourteenth Amendments to the Constitution violated by a lineup viewing involving a key prosecution witness, which was conducted in the absence of counsel several months after counsel had appeared in the matter.

2. Were the Petitioner's Constitutional Rights under the Fifth, Sixth, and Fourteenth Amendments to the Constitution violated by the use for impeachment purposes of an alleged admission taken in the absence of counsel after the appellant's right to counsel had attached.

3. Having determined that violations of Constitutional Rights had occurred because of the errors described above was the United States Court of Appeals

for the Second Cirucuit incorrect in determining that the errors were harmless beyond a reasonable doubt.

LIST OF PARTIES

The parties to the instant proceeding are Quentin Meadows, Petitioner, Robert H. Kuhlmann, Superintendent, Sullivan Correctional Facility, Fallsburg, New York, Robert Abrams, Attorney General of New York, and Denis Dillon, District Attorney of Nassau County, Respondents.

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To the Honorable The Chief Justice, and Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW

The opinion of the original trial judge denying Petitioner's motion to suppress the lineup identification and allowing the Petitioner to be impeached by the use of his alleged admission taken in violation of his right to counsel was not officially reported but is reproduced herein, in Appendix A.

The Order of the New York State Appellate Division, Second Department affirming the rulings of the trial judge has been officially reported in 102 AD2d 1016 (2nd Dept., 1984). A copy of said Order is reproduced in Appendix B.

The decision of the New York Court of Appeals affirming the Order of the Appellate Division has been officially reported in 64 NY2d 956, 477 N.E.2d 1097, 488 NYS2d 643 (1985). A copy of said Order is reproduced in

Appendix C. This Court denied a Petition for a Writ of Certiorari on October 7,1985, at 106 S.Ct. 69 (1985).

The Decision and Order of the United States District Court for the Eastern District of New York regarding the Petitioner's application for a Writ of Habeas Corpus has not yet been officially reported, but is reproduced herein in Appendix D.

The Decision of the United States Court of Appeals for the Second Circuit affirming the District Court's decision and judgment has not yet been officially reported but is reproduced herein in Appendix E.

JURISDICTIONAL GROUNDS

The Order and Decision of the United States Court of Appeals for the Second Circuit affirming the denial of the Petitioner's application for a Writ of Habeas Corpus was entered on February 20, 1987. The Petitioner is therefore timely filing this application for a Writ of Certiorari pursuant to Rule 20 of the Untied States Supreme Court Rules and the Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS

Constitutional provisions involved in this case are the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

The Petitioner, Quentin Meadows, was convicted in the County Court of Nassau County, State of New York, on March 5, 1982, of two counts of Robbery in the First Degree under Indictment No. 51633/80. The Petitioner was accused of robbing the same gas station on two occasions, to wit, October 21, 1980, and October 29, 1980. He was sentenced to a term of from ten to twenty years, and is presently incarcerated in the custody of the New York State Department of Correction. The People's evidence during the trial, consisted of three identification witnesses, with respect to the robbery of October 21, 1980 and two identification witnesses with respect to the incident of October 29, 1980. The Petitioner had moved prior to trial, through a Suppression Motion to Suppress

the identification testimony as well as an admission allegedly made by the Petitioner shortly after his arrest.

During the Suppression Hearing, John Taylor and James Alviti testified that on October 21, 1980 they were working as Gas Station Attendants, at the BP Station in Elmont Long Island. According to the witnesses at around 9:15 p.m., that evening, a tall black man in his mid-twenties, over six feet, with a thin build and afro entered the station carrying a gun and ordered them and another person who was on the premises into the back room. The perpetrator then took money from the three individuals and ordered them to lie on the floor. The witnesses stated that during the incident they were able to observe the perpetrator's face for about two or three minutes. On the following day, Mr.Taylor

and Mr. Alviti were shown photographs and slides by the Nassau County Police Department. Both individuals were present together at the slide viewing and selected the same slide at the same time. Later, both were shown a file containing an array of six photographs from which they selected number 6.

Mr. Taylor further testified that on October 29, 1981, at around 9:00 p.m., while he was again working at the same station the same perpetrator entered the premises and again robbed him and another person, Vincent Rizzuto. The witness stated that he was able to observe the individual for about two or three minutes from a distance of several feet. Later when police arrived Taylor told them it was the same man as before and again selected photograph No. 6 from the same array of photos previously

shown to him. Both witnesses identified the Petitionerin open court as the perpetrator of the robberies.

During cross examination, Taylor stated that the perpetrator was about his own height, i.e., 6'1" or 6'2", but acknowledged that his initial description to police officers was 6'2" to 6'4". Mr. Alviti also acknowledged that he had given a description of the perpetrator as being 6'4". Taylor also stated that he was shown the photo array again shortly before his testimony at the hearing.

Police Officer John Curry, testified that he conducted the slide viewing for Taylor and Alviti on October 22, 1981, based upon descriptions given by the two witnesses.* Curry showed them a

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* The Petitioner's photo however, was not included in the array by description characteristics,but was purposefully inserted by detectives.

total of 16 slides. Included among the 16 were the Petitioner's photo which was selected by both witnesses. Curry stated that the Petitioner's photo was the only one shown to the witnesses twice.

Detective Bartlett, testified that he instructed Detective Curry to make sure that the Petitioner's photo was placed in the slide viewing for Taylor and Alviti. During the viewing both men selected the Petitioner's photo.

DetectivesBartlett and Howell then testified that on October 29, 1980, they responded to the scene of th BP Services Station where they were advised by Mr. Taylor that he had been robbed, and that the perpetrator was the same individual who had robbed him a week earlier. When Mr. Taylor and Mr.Rizzuto were shown an array of photographs on

the scene they selected No. 6, the Petitioner.

A felony complaint was thereafter executed and filed and an arrest warrant for the Petitioner was obtained on November 7, 1980 from Judge Myron Steinberg, of the Nassau County District Court. Pursuant to the said warrant, the Petitioner Meadows was arrested on November 20, 1980, at his home in Hollis, Queens, by Detective Bartlett and other police officers from the Nassau County Police Department.

According to Detective Bartlett, the Petitionerwas read his Miranda Warnings after his arrest and was taken to the Robbery Squad room of the Nassau County Police Department. While in custody that day, the Petitioner was alleged to have made an oral statement to

Detective Howell, in which he admitted committing the two gas station robberies.

An indictment against Petitioner was thereafter filed on January 26,1981. At his arraignment on March 25, 1981, Petitioner was represented by James Horan, Esq., who filed an appearance as retained counsel. Mr. Horan requested and was given a two-month adjournment to prepare for trial and make motions. During those two months, the trial court unsuccessfully attempted to communicate orally with Mr. Horan on numerous occasions to notify him to attend a conference on Petitioner's case.

A motion was then filed by the State requesting a pretrial lineup. The motion was never answered and Mr. Horan made no appearance with respect to it. The Trial Judge granted the motion for the lineup and sent a copy of the

order which expired on May 30, 1981, to Mr. Horan. The lineup was then arranged for May 19, 1981, and Detective Bartlett stated that on that day he telephoned Mr. Horan's office several times, but was unable to speak to him directly. The lineup was then held in the absence of Mr. Horan and the Petitioner was identified by Vincent Rizzuto.

Vincent Rizzuto, testified that on October 29, 1980, at about 9:15 p.m., he was with John Taylor at the BP Service Station when the Petitioner Quentin Meadows robbed them. Rizzuto stated that after the incident when police arrived he gave a description of the perpetrator as black, tall, skinny, about 160 lbs. He was shown a group of six photographs by police and he selected the Petitioner. Rizzuto stated that he saw the same

photograph again when he went to the line-up and shortly before he testified in court. Rizzuto further testified that he attended the line-up on May 19, 1981 and looked at six black males.* He picked out the Petitioner. Rizzuto also identified the Petitionerin open court as the perpetrator.

At the conclusion of the hearing, the trial court denied Petitioner's motion to suppress any of the identifications in question. The court also ruled that the prosecution could not use the petitioner's admission on its direct case since it was obtained in violation of his right to counsel as set forth in the New York Court of Appeals' decision in People v. Samuels, 49 NY2d 218 (1980). The Court however, held that

* When shown the line-up photos he changed his testimony to five.

the prosecution would be permitted to use the statement for impeachment purposes, if the Petitioner took the stand.

During the trial, Taylor, Rizzuto and Alviti were allowed to make in court identifications and Rizzuto was also allowed to testify about his identification of the Petitioner at the May 19th lineup.

Quentin Meadows, the Petitioner, testified in his own behalf. He stated that he was 25 years of age, six feet tall and resided at 100-55 251st Street in Hollis, Queens. He acknowledged having two prior convictions regarding the taking of property. Mr. Meadows also stated that in October of 1980, he had a moustache. The Petitioner thereafter denied any involvement in the two robberies of the BP Service Station.

Mr. Meadows also stated that on occasion he had been "slapped around by police". During cross examination, Mr. Meadows also denied telling Detective Howell at the time of his arrest that he had stolen money from the gas station.

Detective Bartlett, called as a People's rebuttal witness, stated that at the time of Meadows' arrest he had found the Petitioner in the closet of his second floor house wearing a red short-sleeved shirt.

Detective Howell, also called as a People's rebuttal witness, stated that some three and one-half hours after the Petitioner's arrest, Meadows told him that he had committed the robbery at the BP Station on October 21 and 29, and didn't know that the robberies were committed in Nassau County.

During cross examination, Howell

acknowledged that the statement,although reduced to writing, was never signed by the Petitioner.

After listening to the evidence and deliberating for several hours, the jury found the Petitioner guilty of the two counts of robbery, which were alleged in the Indictment. The Petitioner thereafter appealed his judgment of conviction to the Appellate Division, Second Department, which unanimously affirmed without opinion on June 4, 1984. On March 21, 1985, the New York Court of Appeals, also affirmed the Petitioner's conviction holding that the error if any in the introduction of Rizzuto's lineup identification was harmless. That Court also held that the Petitioner's incriminating admission was properly used for impeachment purposes. On October 7,

1985, this Court denied the Petitioner's application for a Writ of Certiorari.

On December 17, 1985, the Petitioner filed a Petition for a Writ of Habeas Corpus with the Federal District Court for the Eastern District of New York. On September 19, 1986, Judge Platt, in a Memorandum and Order denied Petitioner's application holding that any error regarding the identification testimony was harmless beyond a reasonable doubt, and that the alleged incriminating admission could be used because the Sixth Amendment Right to counsel had not attached.

On February 20, 1987, the United States Court of Appeals for the Second Circuit held that error had occurred in the admission of the lineup identification and that the Petitioner's Constitutional Right to counsel pursuant

to New York Criminal Procedure Law had attached at the time he made the alleged incriminating admission so that the use of those statements for impeachment purposes was error. The Court of Appeals, determined however, that the errors which occurred were harmless beyond a reasonable doubt, and affirmed the denial of the Petition for a Writ of Habeas Corpus.

A Writ of Certiorari is therefore being requested to review the determination of the United States Court of Appeals.

ARGUMENT

As To The Lineup Viewing By Vincent Rizzuto:

This Court has repeatedly held that a post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution and that police who conduct such a lineup in the absence of counsel deny the accused his Sixth and Fourteenth Amendment rights. Such action calls into question the admissibility at trial of the lineup identifications as well as the in-court identifications of the accused by witnesses who attended the lineup (see United States v. Wade, 388 US 218 [1968]; Gilbert v.California, 388 US 263 [1968]; Kirby v. Illinois, 406 US 682 [1972]).

In Gilbert v. California, supra at p 273, the Court specifically stated:

> "Only a per se exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of counsel at the critical lineup."

In the case at bar the Petitioner was arrested on November 20, 1980. An indictment was thereafter filed on January 26, 1981. At the Petitioner's arraignment on the indictment held on March 25, 1981 he was represented by retained counsel, James Horan, Esq., who appeared on his behalf. A date was thereafter set for motions and a conference date on the matter was set for May 25, 1981. After indictment and while the petitioner was represented

by Mr. Horan, a lineup involving the petitioner was conducted on May 19,1981, pursuant to a court order which expired on May 30, 1981. The petitioner's counsel was not present at the time of the lineup. Thus, the lineup in question took place more than six months after the incident and several months after the arraignment. There were no exigent circumstances which made it necessary to proceed in the manner which occurred.

Applying the applicable legal pricip les to the facts herein, the Second Circuit Court of Appeals correctly held that the post indictment lineup conducted in the absence of defense counsel was in violation of Petitioner's Constitutional rights. The argument raised by the Respondent and which was adopted by some of the Courts below

to the effect that the Petitioner's rights had been waived because of his attorney's failure to respond to requests to appear at the lineup is misplaced. At no time did the Petitioner waive his right to counsel at the lineup. There has always been a strong presumption against a waiver of fundamental Constitutional rights. This Court has always emphasized that a waiver of Constitutional rights must be competent, intelligent and voluntary and that a right too easily waived is no right at all. See Johnson v. Zerbst, 304 US 458 (1938); People v. Hobson, 39 NY2d 479 (1976). In the case at bar, the right of waiver was a personal right of the Petitioner, which could only be exercised by him after due reflection and consideration and after consultation with an attorney. The trial court's

position that Petitioner's right to counsel at the lineup could be waived as a result of the attorney's lack of diligence in pursuing the matter* is therefore unsupportable.

The trial court in reaching its decision had remarked:

> "[I]t is worthy of observation that Mr. Horan [petitioner's original counsel has not appeared during the course of this hearing to offer any testimony indicating that he did not have any notice of the proposed lineup or sought any adjournment of the same . . .
>
> . . . Counsel cannot ignore his obligation to the defendant and thereby frustrate every effort to have this matter proceed in an orderly fashion. To find otherwise would give

* The record is unclear why Mr. Horan did not appear and it may have been because he was on trial.

> counsel license to merely ignore motions, directives of this Court and have it all inure to the benefit of his client. That obviously cannot be sanctioned and it is not sanctioned."

What the trial court and Judge Platt of the Federal District Court who concurred in the trial court's reasoning failed to consider was that other remedies were available to quickly correct any failure on the part of defense counsel without stripping the Petitioner of his fundamental right to counsel. Thus, strong judicial sanctions including contempt or fine could have been threatened against Mr. Horan, if he did not comply with requests to appear, or in the alternative Mr. Meadows could have been brought before the court advised of Mr. Horan's omission and given the option of having

another attorney retained or assigned to represent him. Significantly, the order to hold a lineup still had 11 days to run, and the lineup itself was being held more than six months after the incident. There was thus, no emergency situation which would justify the arbitrary denial of the Petitioner's right to counsel merely because the trial court felt that his attorney had not responded to the Court's directives. Significantly, the originally scheduled conference date of May 25, 1981, had not yet come up and the court could have waited until then to determine Mr. Horan's situation and the wishes of the Petitioner.

Defense counsel during the suppression hearing strongly emphasized the issue of lack of counsel at the lineup and specifically urged the court:

> "I say also we have established that no counsel was present even though at that time Mr. Meadows was represented by an attorney, a Mr. Horan. Again, I will be candid with the Court, what transpired then I have no knowledge. But I say this. I don't think Mr. Meadows should be punished for what his attorney or any attorney neglected to do.
>
> I think the purpose in having an attorney there is to protect his rights and to see that at the time and place it is fairly conducted.
>
> Mr. Meadows was deprived of that through no fault of his own. There could have been a remedy, there could have been another attorney assigned by the court.
>
> . . .
>
> MR. RUBENFELD: Then I submit then that the identification relative to the lineup should be suppressed."

In further argument to the trial court, trial counsel aptly phrased the issue as "why should Mr. Meadows be punished for what his attorney or any

other attorney neglected to do."

In the case at bar, a balancing of fundamental interests reveals that other steps could have been easily taken to avoid any further delay in the holding of the instant lineup, without taking the drastic step of denying the Petitionerhis right to counsel without his knowledge of concurrence. Even as a matter of future public policy, a decision that counsel could be dispensed with if law enforcement officials are unable to reach a defendant's attorney may lead to an increase in lineups being held without counsel based upon police representation that "counsel was unavailable". Thus, both with respect to the facts of the instant case and for future public policy the holding of the instant lineup in the absence of defendant's counsel violated fundamental Constitutional rights and such lineup testimony

should have been suppressed.

As To The Use For Impeachment Purposes Of Alleged Incriminating Statements Taken In Violation Of The Petitioner's Right To Counsel:

In the case at bar, the Petitioner was arrested following the filing of a felony complaint and the issuance of an arrest warrant by the Nassau County District Court. Following such arrest, Detective Howell alleged that the Petitioner in the absence of counsel admitted to him that he had committed the robberies in question. Relying upon the New York Court of Appeals decision in People v. Samuels, 49 NY2d 218(1980), the prosecution and the trial court below acknowledged that the alleged statement was inadmissible on the People's direct case, since the petitioner's right to counsel had attached at the time of the

alleged admission and the admission had occurred in the absence of counsel. The trial court ruled however, that if the Petitioner testified, the admission could be used on cross examination for impeachment purposes, pursuant to United States Supreme Court decisions in Harris v. U.S. 401 US 222 (1971) and Oregon v. US, 420 US 714 (1975).

Thus, after the petitioner testified at the trial, the prosecutor asked him on cross-examination:

> "Isn't it a fact Mr. Meadows that when you were arrested you told Detective Howell that you stole the money from the gas station."

Further, the prosecutor later called Detective Howell as a rebuttal witness who testified that the Petitioner had made such a statement to him. Defense counsel objected to this line of

inquiry and argued strenuously that his type of cross-examination and rebuttal testimony was improper.

The New York Court of Appeals, affirmed the trial court's determination that the statements were properly used for impeachment purposes. See People v. Meadows, 64 NY2d 956 (1985). The Federal District Court determined the issue on a different ground holding that the Sixth Amendment Right to counsel had not attached at the time the statements were made because adversarial judicial proceedings had not commenced.

The Circuit Court of Appeals, correctly rejected the view of both the New York Court of Appeals and the Federal District Court below and held that pursuant to New York Criminal Procedure Law, Petitioner's Constitutional right to counsel had attached at the

time he made the alleged statements, and that the use of those statements made in the absence of counsel was error.

The Second Circuit first applied this Court's determination in Hamilton v. Alabama, 368 US 52 (1961), that we must look to State law to determine what is a critical stage of a Criminal Prosecution so as to determine the commencement of adversarial process. See also Coleman v.Alabama, 399 US 1 (1970).

Significantly, this Court in Kirby v. Illinois, 406 US 682 (1972), and Brewer v.Williams, 430 US 387 (1977), specifically stated that the right to counsel granted by the Sixth and Fourteenth Amendments attaches at or after the time that judicial proceedings had been initiated against him, "whether by way of formal charge, preliminary hearing, indictment,information or

arraignment." The Federal District Court had erroneously concluded that the right to counsel attached only upon indictment. By specifically mentioning situations other than indictment where the right to counsel would attach, this Court made clear in Kirby and Brewer, supra, that the situation is not limited only to indictment.

Applying, New York Criminal Procedure Law to wit, Section 100.05, of the New York Statute, the Second Circuit correctly concluded that a criminal action commenced with the filing of an accusatory instrument including a felony complaint. The New York Court of Appeals in People v. Samuels, 49 NY2d 218 (1980), had specifically so reiterated.

Having correctly concluded that the right to counsel had attached the

Second Circuit relying upon its prior pronouncements in United States v. Brown, 699 F2d 585 (2nd Cir., 1983), specifically held that permitting the prosecution to impeach the Petitioner with the incriminating statements was constitutionally infirm. The Second Circuit specifically concluded:

> "the government had a 'heavy burden' of proving that any inculpatory statements taken in violation of the Sixth Amendment right to counsel were voluntarily given after a valid waiver of that right. We held that, absent a valid waiver, the use of a statement taken in derogation of a defendant's right to counsel was absolutely prohibited, not only in the government's case-in-chief, but as impeachment evidence as well. Id. at 590. In the instant case, there was no waiver of appellant's right to counsel prior to the taking of the incriminating statements. Accordingly, we hold that it was constitutionally erroneous to permit the state to introduce those statements."

In United States v. Brown, supra, the Second Circuit relied upon this Court's decison in New Jersey v. Portash, 440 US 450 (1979), and specifically distinguished between statements taken in violation of the Miranda Warnings and those taken in violation of Sixth Amendment Rights. The Court specifically stated at pages 589 and 590:

> "The government argues that since a statement taken from a suspect in violation of the strictures of Miranda v. Arizona, is admissible for impeachment if its' 'trustworthiness...satisfies legal standards, see Harris v. New York, 401 U.S. at 224, 91 S. Ct. at 645; Oregon v. Hass, 420 U.S. 714, 722, 95 S.Ct. 1215, 1221, 43 L.Ed. 2d 570 (1975), a statement taken in violation of a suspect's Sixth Amendment rights should be treated in the same fashion. This argument is rendered untenable by the Supreme Court's decision in New Jersey v. Portash, 440 US 450, 99 S.Ct. 1292, 59 L.Ed.2d 501 (1979), which the government ignores, and our decision

in Mohabir, supra.

In Portash the Court held that where the use of a defendant's prior statement (in that case immunized grand jury testimony) would be a clear violation of his Fifth Amendment rights, such testimony could not be used even for impeachment purposes. Id. at 459, 99 S.Ct. at 1297. See also Mincey v. Arizona, 437 U.S. 385, 398, 98 S.Ct. 2408, 2416, 57 L.Ed. 2d 290 (1978) (involuntary confession may not be used to impeach credibility). Faced in Portash with the same argument as that advanced here by the government, i.e., that the Court should follow its earlier rule enunciated in Harris and Hass, the Court held that although a statement taken in violation of a suspect's Miranda rights could be used for impeachment purposes a statement taken in violation of a defendant's constitutional rights could not be so used. It reasoned that, while Miranda rights could be balanced against the need to deter perjury, when dealing with 'the constitutional privilege. . .[balancing. . . is . . . . impermissible.' 440 U.S. at 459, 99 S.Ct. at 1297.

Here we deal with the taking

> and use of an indicted defendant's statement in violation of his Sixth Amendment Right to counsel. Balancing this constitutional protection therefore, is similarly 'impermissible'. Indeed, in Mohabir, we held that even though the defendant, before giving a statement to the prosecutor after the filing of an indictment, had been warned of his Fifth Amendment and Miranda rights, this did not qualify as a waiver of his Sixth Amendment right to counsel because waivers of such rights 'must be measured by a 'higher standard than are waivers of Fifth Amendment rights,' 624 F.2d at 1146 (quoting from Judge Friendly's dissent in Massimo, supra). A fortiori the admission of the statement obtained by Agent Shea in violation of Brown's Sixth Amendment right to counsel was clear error."

The position taken by the Second Circuit on this issue is directly contrary to the position taken by the New York Court of Appeals in the instant case and in People v. Riccio, 56 NY2d

320 (1982) and People v. Maerling, 64 NY2d 134 (1984). This Court should therefore grant the instant Petition to resolve the conflict on this important matter. In fact, Justice White in Lucas v. New York, 106 S. Ct. 282 (1985), specifically so stated in his dissenting opinion. In light of the Second Circuit reaffirmation of its position in United States v. Brown, supra, and the continuing conflict on this issue, it is now an appropriate time for this Court to finally determine the issue.

As To The Determination Of Harmless Error:

After correctly determining that two serious constitutional errors had occurred because of the denial of right to counsel, the Second Cirucit incorrectly held that the errors were harmless and did not deny the Petitioner a fair trial.

It must be noted, that in order for such a doctrine to apply when violation of Constitutional rights are involved, the error must be harmless beyond a reasonable doubt. See Chapman v. California, 386 US 18 (1967).

In the case at bar, with respect to the October 29th robbery only one other witness (Taylor) identified the Petitioner besides Rizzuto. With respect to the October 21st incident only Taylor and Alviti made identifica-

tions. Signficantly, Paul Cufalo, the other person on the scene who had an equal opportunity of observation was unable to make an identification. Also police procedures involved in the case at bar were highly suggestive and conducive to undue influence. Both Taylor and Alviti for example were shown photos after the slide viewings. The appellant's photo was the only one which was contained in both arrays,* and the slide viewings were conducted for both Alviti and Taylor at the same time. Both individuals being cousins and friends would certainly be expected to discuss the issue with each other.

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* Interestingly, the appellant's photos was not one which was selected by the computer based upon description characteristics but was purposefully inserted by detectives.

It must also be noted that the original height description furnished by Taylor and Alviti to police varied by several inches from the actual height of the appellant.

In addition, Rizzuto himself acknowledged that he was shown photos prior to the lineup. The lineup itself was composed of only four other individuals who were in fact police officers. Rizzuto's credibility as to the accuracy of his lineup and in court identification is also placed in serious question by his inability to even remember how many persons were in the lineup and the fact that he appeared to have a drinking problem even having been arrested for drunken driving two days after the alleged incident.

In the case at bar, the Petitioner was severely prejudiced by the admission

of the lineup testimony since such testimony bolstered not only Rizzuto's credibility as to the in-court identification but also served to reinforce Taylor's identification testimony. In fact, in the case at bar, the prosecutor repeatedly stressed Rizzuto's lineup identification to the jury, raising it on two occasions in the questioning of Rizzuto and in his summation.

In the instant matter, the Petitioneralso testified in his own behalf denying any involvement in the robberies. Thus, under all these circumstances the evidence of guilt was in no way of a degree to warrant a harmless error conclusion. On the contrary, one could ask if the people's case was as strong as they claim why did they go to the trouble and effort

to hold an improper lineup more than six months after the Petitioner's arrest.

With respect to the use of the statements for impeachment purposes their introduction was in fact highly prejudicial and substantially contributed to the conviction. Not only were the contents of the statements prejudicial but since the Petitioner denied ever making them, he was placed in a position of having his credibility challenged by the word of a police officer. The prejudicial effect of the statements was also illustrated by the fact that the New York Court of Appeals in affirming the Petitioner's conviction considered the statements in the totality of evidence in concluding that any error regarding the lineup identification was harmless. See People v. Meadows, 64 NY2d 956 (1985). We thus have a

situation where improperly admitted evidence was used to bolster and rationalize the use of other improperly admitted evidence.

It is thus highly probable that the serious errors of a Constitutional dimension which occurred contributed to the Petitioner's conviction and were therefore, clearly not harmless beyond a reasonable doubt.

Under all the circumstances the instant matter offers this Court an opportunity to discuss and resolve novel issues of an important nature. The Petition for a Writ of Certiorari should therefore be granted.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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APPENDIX

APPENDIX A -

RELEVANT PORTIONS OF DECISION OF HONORABLE RAYMOND HARRINGTON, COUNTY COURT, NASSAU COUNTY, REGARDING MOTION TO SUPPRESS HELD ON NOVEMBER 20, 1981

Ind. No. 51633 of 1980

COUNTY COURT, NASSAU COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

-against-

QUENTIN MEADOWS,

Defendant.

... After hearing the Court will first determine, since it was not addressed by counsel -- lest the Court overlook it, that the statements allegedly made by the Defendant Meadows, although the same cannot be used or introduced by the People on their direct case under People against Samuels; they will be permitted to use the same in the event the defendant testifies under the so-

called Harris case.

The Court concludes that based upon the testimony adduced at this hearing, there was absolutely no evidence indeed not even a suggestion, that there was any traditional force, coercion, intimidation or otherwise which induced the statements allegedly made by the Defendant Meadows.

Concerning the identification procedures... I think it worthy of note also that there has been some suggestion made that the Defendant had been denied his right to counsel in connection with the so-called lineup. Actually the only testimony we have had during the hearing is that Detective Bartlett on a couple of occassions called a Mr. Horan's office to advise him of the date, time and place of the lineup, and did in fact leave that information at his office.

I think it is worthy of note that there did appear in this court upon the Defendant's arraignment a Mr. Horan who filed a notice of appearance for the Defendant. Mr. Horan has never again actually appeared in this court in connection with his representation at any time of this Defendant. At the time of his arraignment Mr. Horan was given a substantial period of time at his request for the purpose of making motions, which have to this date never been made, some eight or nine months later... the Defendant having been arraigned on March 25, 1981, some eight months later...

...Again the Defendant had been arraigned before this Court on March 25, 1981, a substantial adjournment was given to James Horan at his request for the purpose of making motions and otherwise proceeding with the case preparing it

for trial. And indeed the Court gave him a two month adjournment to May 25, again to this very date there have been no motions made in this case.

The Court has never had the pleasure of having Mr. Horan appear in this court, again for conference or otherwise, although my chambers have tried to have him here on many, many, many occassions.

The application for the order of this Court was made by motion. That motion has been adjourned not having been answered and there being no appearance by counsel in connection with the motion. And finally the motion granted and an order executed by this Court directing that the lineup take place. Again I am led to believe that that order, a copy thereof was sent to the attorney of record at that time, Mr. James Horan.

And it is worthy of observation that Mr. Horan has not appeared during the course of this hearing to offer any testimony indicating that he did not have any notice of the proposed lineup or sought any adjournment of the same.

I think it further worthy of note that Mr. Horan filed his notice of appearance as a retained counsel, and it is quite obvious to this Court that Counsel cannot ignore his obligation to the Defendant and thereby frustrate every effort to have this matter proceed in an orderly fashion. To find otherwise would give counsel license to merely ignore motions, directives of this Court and have it all inure to the benefit of his client. That obviously cannot be sanctioned and it is not sanctioned.

Based on all of the foregoing the Defendant's oral motion to suppress

the in-court identification or the line-up identification is in all respects denied. And all of the foregoing will constitute my conclusions of law and determinations of fact in connection with this matter and this oral motion.

APPENDIX B -

ORDER OF THE APPELLATE DIVISION, SECOND DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK, JUNE 4, 1984.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department held in Kings County on June 4, 1984.

HON. VITO J. TITONE, Justice Presiding
HON. GUY J. MANGANO,
HON. WILLIAM C. THOMPSON,
HON. RICHARD A. BROWN.

Associate Justices

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

QUENTIN MEADOWS,

Appellant.

In the above entitled action, the above named Quentin Meadows, defendant in this action, having appealed to this court from a judgment of the County Court,

Nassau County, rendered March 5, 1982; and the said appeal having been argued by Spiros A. Tsimbinos, Esq., of counsel for the appellant, and argued by Denise Parillo, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof (affirmed, no opinion) it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed.

Enter:

Irving N. Selkin

Clerk of the
Appellate Division.

APPENDIX C -

DECISION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK, MARCH 21, 1985.

STATE OF NEW YORK
COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

v.

QUENTIN MEADOWS,

Appellant.

The order of the Appellate Division should be affirmed.

On October 21, 1980, a man entered a gas station and robbed an attendant, John Taylor, and his cousin, James Alviti. At police headquarters the next day, Taylor and Alviti identified defendant from a group of slides and photographs. A week later, the same man appeared at the station and robbed Taylor and his co-worker, Vincent Rizzuto. After the

robbery, Taylor informed police that he recognized defendant as the perpetrator and both he and Rizzuto identified defendant from a photographic array. Defendant was arrested pursuant to a warrant on November 7, 1980, and, upon his arrival at the precinct, confessed to both robberies. On May 19, 1981, after the indictment, defendant was placed in a lineup and identified by Rizzuto. The other victims did not view the lineup. Defendant's attorney, James Horan, although notified that the line-up would take place, did not attend, leaving defendant unrepresented. On the motion to suppress the identifications, the court found that the photo arrays and the lineup were not unduly suggestive and that each of the three victims had an independent source for in-court identifications, based on their

observations during the robberies. The court also concluded that defendant was not denied his right to counsel at the lineup because of counsel's refusal to attend. Defendant was convicted after trial, and the Appellate Division affirmed without opinion.

Defendant challenges principally the introduction into evidence of Rizzuto's lineup identification which, he argues, violated his right to counsel (see, e.g., People v. Settles, 46 NY2d 154). We need not pass on this issue because the error, if any, was harmless. There is no cause to disturb the conclusion of the courts below that the identifications of Taylor and Alviti were untainted by any improper procedure. As to Rizzuto, the record supports the hearing court's finding, affirmed by the Appellate Division, that his in-court

identification was based on observation of defendant during the crime rather than at the lineup. In the face of three in-court identifications by eye-witnesses, the evidence of Rizzuto's lineup identification added little to the already overwhelming evidence of guilt. While defendant testified that he did not commit the robberies, this testimony was thoroughly discredited by his confession, which was properly used for impeachment purposes (People v. Maerling, 64 NY2d 134 [decided December 27, 1984]; People v. Ricco, 56 NY2d 320) even though inadmissible on the People's direct case (People v. Samuels, 49 NY2d 218). In these circumstances, any error in the admission of the lineup evidence would not require reversal (see People v. Adams, 53 NY2d 241, 252).

Defendant's remaining contentions

are without merit.

* *

Order affirmed in a memorandum. Chief Judge Wachtler and Judges Jasen, Meyer, Simons, Kaye and Alexander concur.

Decided March 21, 1985

APPENDIX D -

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK UNDER DOCKET NO. 85 CV 4515 DATED SEPTEMBER 19, 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

QUENTIN MEADOWS,

Petitioner,

-against-

ROBERT H. KUHLMANN, Superintendent, Sullivan Correctional Facility, Fallsbury, New York; ROBERT ABRAMS, Attorney General of New York; and DENIS DILLON, District Attorney of Nassau County,

Respondents.

----------x

PLATT, D. J.

Petitioner, Quentin Meadows, was convicted after a jury trial in New York State Supreme Court, Nassau County, of two counts of Robbery in the First Degree. On March 5,1982, petitioner was sentenced as a second violent felony offender to two indeterminate terms of

ten to twenty years imprisonment to be served concurrently with one another and consecutively to any other sentence previously imposed. His conviction was affirmed without an opinion by the Appellate Division, Second Department, on June 4, 1984. The New York Court of Appeals affirmed in an opinion reported at 64 NY2d 956. The United States Supreme Court denied a petition for certiorari on October 10, 1985. Petitioner is before this Court on an application for a writ of habeas corpus.

In this application two grounds are raised by the petitioner in seeking the writ:

(1) A lineup viewing by a key witness was conducted in the absence of counsel several months after counsel had appeared in the matter.

(2) The petitioner was improperly

impeached by the use of an alleged admission taken in violation of his right to counsel.

I. Factual Background

During the evening of October 21, 1980, John Taylor was working as an attendant at a BP gas station located in Nassau County. Also working at the station was Paul Cufalo. Taylor's cousin, James Alviti, came to the station by bicycle, for a visit, around 9:15 p.m. Petitioner arrived at the station soon after and displayed the butt of a gun to Taylor and Alviti. He ordered them into a back room where Cufalo was already present and made the three men crouch on the floor. Petitioner took cash from Taylor and Alviti and then left. A short time later Taylor called the police and des-

cribed the robbery. When the police responded, Taylor, Alviti and Cufalo gave descriptions of the petitioner.

The next day, Taylor and Alviti went to police headquarters to view slides and photographs in an attempt to identify the robber. They immediately recognized petitioner on one of the sixteen slides and on one picture.

A week later, on October 29, 1980, Taylor was again at work at the BP station. Vincent Rizzuto was also on duty at the station. At about 9:15 that evening, while servicing a car, Taylor recognized petitioner walking into the station's office. Taylor asked a customer to call for help and followed petitioner into the office. Petitioner addressed Taylor by his first name and, at gunpoint, ordered Taylor and Rizzuto into a back room. Petitioner

took cash from Taylor and Rizzuto and left. Taylor called the police. He told them that he had been robbed again by the same person who had robbed him the week before. Detective Byron C. Bartlett arrived at the scene. He showed Taylor and Rizzuto the same photgraphic array that had been used the week before. Both men identified petitioner's picture.

A felony complaint was filed and an arrest warrant for petitioner was obtained on November 7, 1980 from Judge Myron Steinberg. On November 20, 1980, detectives of the Nassau County Police Department apprehended petitioner at his home in Hollis, Queens. Petitioner was read his Miranda warnings and taken to the Robbery Squad Room of the Nassau County Police Department. While in custody, that day, petitioner made an oral statement to Detective

Thomas P. Howell in which he admitted committing the two gas station robberies.

An indictment against petitioner was filed on January 26, 1981. At his arraignment on March 25, 1981, petitioner was represented by James Horan, Esq., who filed an appearance as retained counsel. Mr. Horan requested and was given a two-month adjournment to prepare for trial and make motions. During those two months, the trial court unsuccessfully attempted to communicate orally with Mr. Horan on numerous occasions to notify him to attend a conference on petitioner's case. Minutes of Hearing at 456.

A Motion was filed by the State requesting a pretrial lineup. The motion was never answered and Mr. Horan made no appearance with respect to it. Judge Harrington granted the motion and

sent Mr. Horan a copy of the order. Mintues of Hearing at 456. On the date of the lineup, May 19, 1981, Detective Byron C. Bartlett telephoned Mr. Horan's office several times, but was not able to speak to him directly. Minutes of Hearing at 333-35. The lineup was held in the absence of Mr. Horan and petitioner was identified by Vincent Rizzuto. None of the other victims viewed the May 19th lineup.

At petitioner's trial, Taylor, Rizzuto and Alviti made in-court identifications. Rizzuto also testified about his identification of petitioner at the May 19th lineup. By a prior ruling the prosecution had been barred from using petitioner's admission in its case-in-chief because it was obtained from the petitioner in violation of his right to counsel as set forth in

People v. Samuels, 49 NY2d 218 (1980). However, the prosecutor was permitted to use the statement for impeachment purposes if petitioner took the stand. Petitioner did testify and the prosecution introduced his prior statement through the rebuttal testimony of Detective Howell. Subsequently, the jury returned a verdict of guilty.

II. The Lineup Challenge

Petitioner argues that the May 19th lineup conducted without counsel violated his Sixth Amendment rights. He questions the admissibility of the lineup and the in-court identifications by Rizzuto and claims that such error is not harmless. He further argues that it would be improper to presume that petitioner waived his right to counsel by his attorney's failure to appear.

Petitioner argues that he should not "be punished for what his attorney or any attorney neglected to do." Petitioner's Memorandum of Law in Support of Petition for Writ at 6 (hereinafter "Petitioner's Memorandum").

In Gilbert v. State of California, 388 U.S. 263, 273-74 (1967), the Supreme Court established a per se rule which excludes the admission of pretrial, post-indictment lineups conducted without counsel. At first glance it would appear that this rule should have been applied to Rizzuto's lineup identification and he should have been precluded from testifying about it. However, in Gilbert the lineup in question was conducted without notice to the defendant's counsel, a situation the opposite of what transpired in petitioner's case. It would seem, therefore, that the

strict rule of Gilbert does not apply to this case. Petitioner himself suggests that "this Court has the unique opportunity to determine the important issue of whether a defendant can be denied his constitutional right of counsel by the failure of counsel to appear at a lineup after having been notified and reuqested to do so." Petitioner's Memorandum at 7.

The State court judge, Raymond Harrington, who presided over petitioner's pretrial hearing, strongly resolved this issue against petitioner:

> [I]t is worthy of observation that Mr. Horan [petitioner's original counsel] has not appeared during the course of this hearing to offer any testimony indicating that he did not have any notice of the proposed lineup or sought any adjournment of the same . . . . . Counsel cannot ignore his obligation to the defendant and thereby frustrate every effort to have this matter

> proceed in an orderly fashion. To find otherwise would give counsel license to merely ignore motions, directives of this Court and have it all inure to the benefit of his client. That obviously cannot be sanctioned and it is not sanctioned.

Minutes of Hearing at 456-57.

Judge Harrington's remarks make a good deal of sense. To rule in petitioner's favor on the facts of this case would greatly impair the administration of justice and in the long run cause harm to other defendants. The Supreme Court's rulings in Gilbert and other cases involving identification issues, such as United States v. Wade, 388 U.S. 218 (1967), were meant to encourage counseled lineups in order to insure proper identifications. If this Court were to allow the exclusion of lineups based on the recalcitrance of counsel, law enforcement authorities

might be forced to use other, more suggestive procedures, resulting in more miscarriages of justice.

Even assuming, arguendo, that it was improper to admit Rizzuto's testimony regarding the pretrial lineup, any error that occurred was clearly harmless under Chapman v. California, 386 U.S. 18 (1967). To begin, Rizzuto's in-court identification of petitioner is admissible despite the uncounseled lineup so long as it has an independent origin not tainted by the impermissible lineup identification. United States v. Wade, 388 U.S. at 239-41. Rizzuto had substantial opportunity to view petitioner, gave the police an accurate description of the petitioner and identified him from a photo array immediately after the crime. There can be no doubt that Rizzuto had an independent basis

for making an in-court identification of petitioner.

Petitioner has not challenged the lineup procedure itself, but only argues that the lack of counsel taints it. There is no suggestion by petitioner that either the lineup or in-court identification was the result of suggestiveness which created a substantial likelihood of misidentification. Neil v. Biggers, 409 U.S. 188, 198 (1972). The Court is convinced that under all the circumstances, Rizzuto's in-court identification was sufficiently reliable and therefore not excludable. See Manson v. Brathwaite, 432 U.S. 98, 106-07 (1977).

Rizzuto's in-court identification, when coupled with the eyewitness identifications of Alviti and Taylor, is especially reliable and presents an

overwhelming amount of evidence. Whatever harm occurred by admitting testimony of Rizzuto's pretrial identification was small. The Court has no doubt that the jury's decision would have been the same.

III. Admission of Petitioner's Statement

At petitioner's pretrial hearing the prosecutor conceded that, although there was no evidence of coercion, petitioner's statement to Detective Howell could not be used in the People's case-in-chief because it was taken after the defendant was arrested pursuant to a warrant. Minutes of Hearing at 243. The New York Court of Appeals held in People v. Samuels, 49 N.Y.2d 218 (1980), that a criminal action in New York commences with the filing of an accusatory instrument which includes the

felony complaint that precedes an arrest warrant. At this point a defendant's right to counsel attaches and New York Courts have held that a defendant may not waive his right to counsel outside the presence of counsel. See, e.g., People v. Grimaldi, 52 N.Y.2d 611, 616 (1981). However, the prosecution was, under the authority of Harris v. New York, 401 U.S. 222 (1971), permitted to use the statement to impeach the petitioner after he testified.

Petitioner argues that the admission of the statement for purposes of impeachment was improper under the holding of the Second Circuit in United States v. Brown, 699 F.2d 585 (2d Cir. 1983). In Brown the Court held that a statement taken in violation of a defendant's Sixth Amendment right to counsel could not be used for impeachment

purposes even if the strictures of Miranda had been complied with.

Respondents argue that Brown does not apply to this case. The contention is made that the New York Court of Appeals in Samuels, supra, created a right to counsel that is unique to New York, based on local statutes. Respondents claim that the federal right to counsel was not violated. They posit that petitioner's statements were not admissible in the prosecution's case-in-chief because "they were obtained in violation of the more restrictive New York State Right [sic] to counsel which had attached simply because a felony complaint had already been filed." Respondents' Memorandum of Law at 12.

Brown, is of course, only concerned with a violation of a defendant's right to counsel under the Sixth

Amendment of the United States Constitution. Although Brown involved a federal prosecution, it does not by its terms limit itself to those cases but would also apply to State defendants whose Sixth Amendment rights have been violated by the improper admission of statements for impeachment purposes. However, the Court in Brown did limit its holding to those "statement[s] taken from an indicted defendant in violation of his Sixth Amendment rights. It does not extend to statements taken under other circumstances, such as when the statement is obtained before indictment and prior to the attachment of a constitutional right to counsel." Brown, 699 F.2d at 590 (emphasis in original).

In determining whether a State defendant has been subjected to an

improperly admitted statement under Brown, a court must first determine: when the right to counsel attached; whether the statement was obtained after the right attached, and whether there had been a valid waiver of that right. For purposes of the Sixth Amendment the right to counsel attaches with the initiation of judicial proceedings, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Brewer v. Williams, 430 U.S. 387, 398 (1977) (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)).

A federal court must look to State law to determine whether adversary proceedings have begun. Although the respondents are correct in that a State may create a more expansive right to counsel than that required by the United

States Constitution, it is the unique qualities of State proceedings that will determine whether the right to counsel has attached in a Sixth Amendment sense. Thus, in Hamilton v. Alabama, 368 U.S. 52 (1961), the Supreme Court held that in Alabama an arraignment was a critical proceeding requiring counsel because under Alabama law certain motions not made at that time are waived.

In the present case, at the time the statements were taken from petitioner a felony complaint had been filed and an arrest warrant had been issued by a State judge. The authority of the Second Circuit as to whether this is sufficient to constitute the initiation of adversary proceedings for purposes of the Sixth Amendment is not entirely clear. In United States ex rel. Robinson v. Zelker, 468 F.2d 159 (2d Cir. 1972), cert.

denied, 411 U.S. 939 (1973), the Court interpreted Section 144 of the New York Code of Criminal Procedure, which has since been repealed and replaced by a similar statute. The Robinson Court held that the filing of a complaint and the issuance of an arrest warrant by a State court judge was the beginning of adversary proceedings within the meaning of Kirby v. Illinois, supra, and the defendant had a right to counsel. Robinson, 468 F.2d at 163.

The holding of Robinson was thrown into doubt by the decision of the Second Circuit in United States v.Duvall, 537 F.2d 15 (2d Cir.), cert. denied, 426 U.S. 950 (1976). The Duvall Court held that the filing of a complaint and the issuance of an arrest warrant by a United States Magistrate was not the beginning of adversary proceedings and

no Sixth Amendment right to counsel attached at that point. The Court noted:

> [T]o hold that the accrual of the right to counsel is accelerated by use of the warrant procedure would tend to discourage this whereas the policy should be to encourage it.

Duvall, 537 F.2d at 22.

The Second Circuit discussed this problem again in O'Hagan v. Soto, 725 F.2d 878 (2d Cir. 1984). In Soto the Court noted that Section 144 of the New York Code of Criminal Procedure in Robinson had been replaced by §100.05 of the New York Criminal Procedure Law, which provides that a criminal action is commenced when an accusatory instrument is filed in a criminal court. The Soto Court mentioned that: "Arguably the charging document underlying the warrant on which [the pliantiff] was arrested sufficed to trigger Sixth

Amendment protection, but the matter is clouded by our decision in United States v. Duvall." Soto, 725 F.2d at 879. The Court then expressly refused to resolve the conflict between Robinson and Duvall.

Faced with this ambiguity as to applicable precedent, the Court is of the opinion that Duvall is controlling in this matter. To hold that the right to counsel attached upon the issuance of an arrest warrant would, as the Duvall Court noted, result in the undersirable result of a disincentive to utilize arrest warrants. The application of the right to counsel at early stages of the prosecution was in part a reaction to overzealous police activity. See, e.g., Massiah v. United States, 377 U.S. 201 (1964) (use of radio transmitter by federal agents to obtain admissions of defendant after indictment). It would

seem incongruous to discourage police from obtaining arrest warrants in the name of the Sixth Amendment.[1]

In the present case the Court holds that the Sixth Amendment right to counsel did not attach to the petitioner at the time he made the incriminating statements because adversary judicial proceedings had not begun. There being no right to counsel, the holding of Brown does not apply to this case and thus the statements were properly admitted for impeachment purposes. Of course, having held that petitioner's right to counsel had not attached, the Court need not reach the issue of whether petitioner made a valid

[1] Stranger results, of course, have been obtained over the years but it does not seem to us to be necessary to add another one in this case.

waiver of his right to counsel.

IV. Conclusion

Having found both of petitioner's grounds for a writ of habeas corpus to be without merit, the petition must be and hereby is dismissed.

SO ORDERED.

_____

U. S. D. J.

Dated: Brooklyn, New York
September 19, 1986

APPENDIX E -

DECISION OF UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT
DATED FEBRUARY 20, 1987

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 795—August Term, 1986

(Argued: February 5, 1987 Decided: February 20, 1987)

Docket No. 86-2365

QUENTIN MEADOWS,

Appellant,

— v. —

ROBERT H. KUHLMANN, Superintendent, Sullivan Correctional Facility, Fallsburg, New York, ROBERT ABRAMS, Attorney General of New York, and DENIS DILLON, District Attorney of Nassau County,

Appellee.

Before:

TIMBERS, PIERCE and ALTIMARI,

Circuit Judges.

Appeal from a judgment entered September 25, 1986 in the Eastern District of New York, Thomas C. Platt, *District Judge,* denying a state prisoner's petition for a writ of habeas corpus.

Affirmed.

Spiros A. Tsimbinos, Kew Gardens, N.Y., *for appellant.*

Bruce E. Whitney, Assistant District Attorney, Nassau County, Mineola, N.Y. (Denis Dillon, District Attorney, and Anthony J. Girese, Assistant District Attorney, Mineola, N.Y., on the brief), *for appellees.*

TIMBERS, *Circuit Judge:*

Quentin Meadows ("appellant"), a state prisoner, appeals from a judgment entered September 25, 1986 in the Eastern District of New York, Thomas C. Platt, *District Judge,* denying his petition for a writ of habeas corpus. 644 F.Supp. 757 (E.D.N.Y. 1986). The court held that the error, if any, in the admission in evidence of an identification, made during a lineup after the right to counsel had attached but when defense counsel was not present, was harmless. The court also held that, because appellant's Sixth Amendment right to counsel had not attached at the time appellant made certain incriminating statements, such statements were properly admitted for impeachment purposes.

On appeal, appellant argues, first, that the admission in evidence of the identification made at the lineup when defense counsel was not present violated his right to counsel and that the error was not harmless beyond a reasonable doubt; and, second, that appellant was improperly impeached by the use of his incriminating statements, since the statements were taken in violation of his right to counsel after the right had attached.

We hold that any error in the admission of the lineup identification was harmless beyond a reasonable doubt, in view of the overwhelming evidence of appellant's guilt. We also hold that, although appellant's Sixth Amendment right to counsel had attached at the time he made the incriminating statements and the use of those statements for impeachment purposes was error, such error was harmless beyond a reasonable doubt.

We affirm the judgment denying the petition for a writ of habeas corpus, but we do so on grounds other than those set forth in the district court opinion.

I.

We summarize only those facts believed necessary to an understanding of the issues raised on appeal.

On the evening of October 21, 1980 three individuals were present at a gas station in Elmont, Long Island. Two of the individuals, John Taylor and Paul Cufalo, were attendants at the station. The third, James Alviti, was Taylor's cousin; he came to visit the attendants at approximately 9:15 P.M. Shortly after Alviti's arrival, appellant entered the gas station, displayed the butt of a gun to Taylor and Alviti, and ordered them into the back room where Cufalo was on the telephone. Forcing the three men to lie, or crouch, on the floor, appellant demanded money

from them. Alviti had no money with him. After Taylor and Cufalo gave appellant their money, he fled, after having instructed the three victims to stay in the back room for fifteen minutes.

Taylor called the police and reported the robbery. When the police arrived, Taylor and Alviti gave detailed descriptions of the robber. Cufalo was unable to do so.

The next day Taylor and Alviti went to police headquarters to view some photographs and slides in an attempt to identify the robber. A slide presentation of individuals who fitted the general description, consisting of approximately sixteen slides, was made. Taylor and Alviti viewed the slide presentation together. When appellant's slide was shown, they simultaneously identified it as portraying the robber. A photographic array, consisting of approximately six photographs, was shown separately to Taylor and Alviti. Each of them again identified appellant and each gave statements to that effect.

On October 29, 1980—eight days after the first robbery —Taylor again was at work at the gas station. His coattendant that evening was Vincent Rizzuto. At approximately 9:15 P.M., while Taylor was at the gasoline pumps servicing a car, Taylor observed appellant enter the gas station. He asked the customer to call the police. The customer declined to do so. Taylor then entered the station where he found appellant holding Rizzuto at gun point. Appellant, addressing Taylor by his first name, ordered Taylor and Rizzuto into the back room where he robbed them. Appellant fled, again having instructed his victims to remain in the back room.

Taylor immediately called the police and reported that the same person who had robbed him the week before had

robbed him again. Police officers arrived at the gas station soon after Taylor's call. The officers took a description of the robber. Taylor reiterated that it was appellant who again had robbed him. Detective Byron Bartlett arrived with the photographic array assembled by him the week before and showed it to Taylor and Rizzuto separately. Each identified appellant and gave statements to that effect.

On November 7, 1980 a felony complaint was filed and an arrest warrant for appellant was obtained from a state court judge. On November 20 appellant was arrested at his home by detectives of the Nassau County Police Department. Appellant was given his *Miranda* warnings and was taken to the Robbery Squad Room of the Nassau County Police Department. Several hours later, while still in custody, appellant made incriminating statements to Detective Thomas P. Howell in which he confessed to having committed the two robberies.

On January 26, 1981 appellant was indicted in the Nassau County Court on two counts of robbery in the first degree and two counts of criminal use of a firearm in the first degree. At his arraignment on March 25, 1981, appellant was represented by retained counsel. The attorney requested a two-month adjournment to prepare for trial and to make appropriate motions. The court granted the adjournment as requested. However, no motions were ever filed, nor did the attorney respond to several attempts by the court to contact him to arrange a pre-trial conference.

On February 13, 1981 the state moved by order to show cause for a pre-trial lineup. Defense counsel did not answer the state's motion and made no appearance in response to the order to show cause. On May 19, 1981 the

lineup was conducted in the absence of defense counsel, the detective in charge having attempted to contact the attorney unsuccessfully. The only witness who appeared at the lineup was Rizzuto. He immediately identified appellant, selecting him from the five individuals who participated in the lineup.

On November 20, 1981 a hearing on identification issues raised by the defense was held before the state court.[1] At the close of the hearing, the court issued its findings of fact and conclusions of law. It found that the photographic arrays and the lineup were not unduly suggestive and that each of the three victims who testified had independent sources for their in-court identifications of appellant, based on their observations during the robberies. The court held, however, and the state conceded, in accordance with *People* v. *Samuels*, 49 N.Y.2d 218, 400 N.E.2d 1344, 424 N.Y.S.2d 892 (1980), that the incriminating statements made by appellant to Detective Howell could not be used in the prosecution's case-in-chief because they were made after the right to counsel had attached, and yet counsel was not present when the statements were made. The court further held that the state could use the statements to impeach appellant should he choose to testify because the statements had been made voluntarily within the meaning of *Harris* v. *New York*, 401 U.S. 222 (1971). The court also held that appellant was not denied his right to counsel at the lineup because of his counsel's refusal to attend.

Appellant's trial commenced January 11, 1982. Taylor, Rizzuto and Alviti all testified regarding the identification

[1]Although the record before us is incomplete in this respect, at some point recalcitrant counsel was replaced by new counsel who represented appellant at the hearing and at trial.

proceedings which had been held prior to trial. All three made in-court identifications of appellant. Rizzuto also testified to his prior identification of appellant at the May 19, 1981 lineup. Appellant took the stand in his own defense and testified that he never had been at the gas station involved and that he did not commit the robberies on either occasion. The prosecution then introduced, in accordance with the court's ruling on November 20, 1981, appellant's prior incriminating statements through the rebuttal testimony of Detective Howell. On January 19, 1982 the jury returned a guilty verdict. On March 5, 1982, appellant was sentenced as a second violent felony offender to two concurrent indeterminate terms of ten to twenty years imprisonment. The court ordered the instant sentence to be served consecutively to any other sentence previously imposed.

Appellant appealed his judgment of conviction to the Appellate Division, Second Department, which unanimously affirmed without opinion on June 4, 1984. *People* v. *Meadows*, 102 A.D.2d 1016, 476 N.Y.S.2d 230 (2d Dept. 1984). Leave to appeal was granted. On March 21, 1985 the New York Court of Appeals affirmed, holding that the error, if any, in the introduction of evidence of Rizzuto's lineup identification was harmless. That court also held that appellant's incriminating statements were properly used for impeachment purposes. *People* v. *Meadows*, 64 N.Y.2d 956, 477 N.E.2d 1097, 488 N.Y.S.2d 643 (1985). Subsequently, appellant filed a petition for a writ of certiorari with the Supreme Court of the United States. That petition was denied on October 7, 1985. *Meadows* v. *New York*, 106 S.Ct. 69 (1985).

On December 17, 1985 appellant filed the instant petition for a writ of habeas corpus. The petition was denied

by a judgment entered in the district court on September 25, 1986. A certificate of probable cause was issued by the district court on October 20, 1986.

For the reasons which follow, we affirm.

II.

A.

In *United States* v. *Wade,* 388 U.S. 218 (1967), the Court held that a post-indictment lineup was a critical stage of a prosecution at which a defendant was entitled to the aid of counsel. The Court stated that "... the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial." *Id.* at 228. In *Gilbert* v. *California,* 388 U.S. 263 (1967), a companion case to *Wade,* the Court enunciated a per se rule that, if a pre-trial lineup occurs in the absence of counsel, that pre-trial identification is inadmissible at trial. "Only a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." *Id.* at 273.

Applying these principles, we hold that the post-indictment lineup in the instant case, held in the absence of defense counsel, was in derogation of appellant's constitutional rights. The admission in evidence of Rizzuto's lineup identification therefore was error. This does not end our inquiry: We must determine next the magnitude of the error.

Rizzuto made an in-court identification of appellant as the robber. This in-court identification was admissible.

despite the violation of appellant's constitutional rights, provided it had an independent origin, untainted by the lineup illegality. *United States* v. *Wade, supra,* 388 U.S. at 239-41. The state courts found that the in-court identification of appellant by Rizzuto was based on observation of the appellant during the robbery itself, rather than at the lineup. This is a factual finding to which we must accord the presumption of correctness expressly required by 28 U.S.C. § 2254(d) (1982). *Kuhlmann v. Wilson,* 106 S.Ct. 2616, 2630 (1986).

Further, in light of the overwhelming evidence of guilt, Rizzuto's additional testimony about his lineup identification was merely surplusage. Taylor, who had been victimized twice by appellant in an eight day period, identified appellant in-court as the robber. Alviti also made an in-court identification. The witnesses each testified that they had observed appellant, unobstructed, at close range for a period of time ranging from two to five minutes during the commission of the respective crimes. Moreover, all three witnesses testified that the lighting conditions allowed them to observe appellant clearly. The three witnesses gave accurate descriptions of the robber immediately following the crimes and were able immediately to identify appellant's picture when confronted with the photographic arrays. The searing personal impact of the crimes undoubtedly left these victims with particularly vivid recollections of the events, including the identity of appellant. Indeed, we have recognized that, when a witness also is the victim of a crime, the reliability of the identification is enhanced. *United States ex rel. Phipps* v. *Follette,* 428 F.2d 912, 915-16 (2 Cir.), *cert. denied,* 400 U.S. 908 (1970). *See also Neil* v. *Biggers,* 409 U.S. 188, 200 (1972).

For these reasons we are "able to declare a belief that [the admission of the lineup evidence] was harmless beyond a reasonable doubt," *Chapman* v. *California*, 386 U.S. 18, 24 (1967).

B.

In the instant case, appellant was arrested following the filing of a felony complaint and the issuance of an arrest warrant by the Nassau County Court. As stated above, the trial court ruled, and the prosecution conceded, that, although the incriminating statements made to Detective Howell were inadmissible in the state's case-in-chief because of a constitutional defect, the statements could be used for impeachment purposes because they were given voluntarily. Appellant argues that this ruling constituted reversible error. We disagree.

The Sixth Amendment right to counsel applies only to "critical stages" of a criminal prosecution. The right to counsel attaches once the criminal action has been commenced. There is equal need, however, for the assistance of counsel if substantial rights of an accused may be affected by a particular proceeding or by a statute governing criminal procedure, if that proceeding or statute may be unique to a particular state. Applying that test, the Supreme Court has looked to state law to determine what is a "critical stage", or the commencement of the adversarial process, for purposes of the Sixth Amendment. For example, in *Hamilton* v. *Alabama*, 368 U.S. 52 (1961), the Court held that an indigent defendant was entitled to appointed counsel at an arraignment when state law viewed defenses not raised at that point as abandoned. Likewise, in *Coleman* v. *Alabama*, 399 U.S. 1 (1970), the Court held that the Sixth Amendment right to counsel applied to a preliminary hearing granted by state law. *See*

also White v. *Maryland*, 373 U.S. 59 (1963). We also have turned to state criminal procedure law to determine the point at which a criminal action is commenced in New York. In *United States ex rel. Robinson* v. *Zelker*, 468 F.2d 159 (2 Cir. 1972), *cert. denied*, 411 U.S. 939 (1973), we held that the filing of a complaint and the issuance of an arrest warrant by a state court judge was the commencement of adversarial proceedings for purposes of the Sixth Amendment, pursuant to former Section 144 of the New York Code of Criminal Procedure.

The New York Code of Criminal Procedure was repealed and replaced by the New York Criminal Procedure Law in 1971. "If anything, the new law reflects the legislative choice of an even earlier point in the criminal process to use as the point of commencement of the action." *O'Hagan* v. *Soto*, 523 F.Supp. 625, 630 (S.D.N.Y. 1981). Pursuant to the current statute a criminal action now commences with the filing of an accusatory instrument, including a felony complaint. N.Y. Crim. Pro. Law § 100.05 (McKinney 1981). The right to counsel therefore attached in the instant case with the filing of the felony complaint. *Accord, People* v. *Samuels, supra*, 49 N.Y.2d at 221, 400 N.E.2d at 1346, 424 N.Y.S.2d at 894. The incriminating statements taken by Detective Howell were made in the absence of counsel, in derogation of appellant's constitutional rights. As a result the statements could not be used by the state in its case-in-chief. The state court ruled accordingly. We agree.

The state court, however, permitted the prosecution to impeach appellant with incriminating statements taken in the absence of counsel. We are constrained to hold that this decision was constitutionally infirm. In *United States* v. *Brown*, 699 F.2d 585 (2 Cir. 1983), we held that the

government had a "heavy burden" of proving that any inculpatory statements taken in violation of the Sixth Amendment right to counsel were voluntarily given after a valid waiver of that right. We held that, absent a valid waiver, the use of a statement taken in derogation of a defendant's right to counsel was absolutely prohibited, not only in the government's case-in-chief, but as impeachment evidence as well. *Id.* at 590. In the instant case, there was no waiver of appellant's right to counsel prior to the taking of the incriminating statements. Accordingly, we hold that it was constitutionally erroneous to permit the state to introduce those statements through rebuttal testimony for impeachment purposes.

We decline appellant's invitation, however, to hold that this error requires reversal of his conviction. In contradistinction to the facts in *Brown*, it is utterly unreasonable to suggest that the impeachment evidence played a critical role in the jury's decision in the instant case. As we have held above, the evidence of appellant's guilt was overwhelming. Under these circumstances we hold that the error in admitting appellant's incriminating statements taken in the absence of counsel was harmless beyond a reasonable doubt.

III.

To summarize:

We hold that the error in the admission of the lineup identification was harmless beyond a reasonable doubt.

We further hold that, pursuant to New York criminal procedure law, appellant's constitutional right to counsel had attached at the time he made the incriminating statements. The use for impeachment purposes of those statements made in the absence of counsel was error. Such

error, however, was harmless beyond a reasonable doubt, in view of the overwhelming evidence of guilt.

We affirm the judgment of the district court which denied the petition for a writ of habeas corpus.

Affirmed.